Supreme Court, U.S.
FILED
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

IN THE MATTER OF CHARLES HAROLD KAVALARIS ON DISCIPLINE

Petitioner

APPENDIX TO PETITION FOR WRIT OF

CERTIORARI TO THE

SUPREME COURT OF CALIFORNIA

CHARLES H. KAVALARIS
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San Jose, CA 95113

1-408-295-9796

Petitioner Attorney ***Pro Se***

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SBC No. 95-O-17608
S081332

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

FILED

DECEMBER 15, 1999

Robert Wandruff, Clerk
Deputy

IN THE MATTER OF CHARLES HAROLD KAVALARIS
ON DISCIPLINE

Petition for writ of review is denied.

It is ordered that **Charles Harold Kavalaris,** State Bar No. 46853, be suspended from the practice of law for three years and until he has shown proof satisfactory to the State Bar Court if his rehabilitation, fitness to practice and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, that execution of suspension be stayed, and that he be placed on probation for four years subject to the conditions of probation, including one

year actual suspension recommended by the Hearing Department of the State Bar Court in its decision filed June 14, 1999. It is further ordered that he comply with rule 955, California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively, after the date this order is effective.* Costs are awarded to the State Bar pursuant to Busn. and Prof. Code section 6086.10.* See Business and Professions Code section 6126, subd. (c).

GEORGE

_____

Chief Justice

THE STATE BAR COURT

OF THE STATE BAR OF CALIFORNIA

REVIEW DEPARTMENT - SAN FRANCISCO

In the Matter of	)	Case No. 95-0-17608 NRL
	)	
CHARLES H. KAVALARIS	)	**DECISION AND RECOMMENDATION**
	)	
No. 46853	)	
A Member of the State Bar	)	
	)	

DECISION

Introduction:

This is a contested proceeding. Office of the Chief Trial Counsel (OCTC) was represented by Donald Steedman. Respondent Charles H. Kavalaris (Respondent) represented himself. The parties stipulated to a majority of the facts, and a brief trial was held on April 27, 1999. Following receipt of briefs, tentative rulings on culpability issued May 14, 1999. Trial concerning the appropriate level of discipline was held June 3, 1999. Following oral argument and supplemental briefing, the matter stood submitted on all issues on June 11, 1999.

For the reason hereafter stated, Respondent is found culpable of the disciplinary charges brought against him. It is recommended that he be suspended from the practice of law for three years, that execution of the suspension be stayed, and that he be placed on probation for four years, with conditions including an actual suspension of one year, continued sobriety, and treatment for depression.

Respondent was admitted to the practice of law in California on June 26, 1970, and has been a member of the State Bar of California since that time.

Findings of Fact in Counts One through Three

From 1979 until March, 1991, Respondent was the law partner of Lanny E. Poel. At all times mentioned, Mr. Poel was an attorney licensed to practice in California. The partnership terminated in March, 1991.

From 1985 until 1990, Mario Gullo was the Secretary-Treasurer of the San Jose Teamsters Union, Local 287. He retired from the Teamsters in 1990. Mr. Gullo was not an

attorney.

In 1985, Mr. Poel, Respondent, and Mr. Gullo would refer personal injury clients to Mr. Poel and Respondent in exchange for approximately ten percent of any attorney's fees earned by Mr. Poel and Respondent. Beginning in 1985, Mr. Gullo referred numerous cases to Mr. Poel and Respondent. In return, beginning in 1985, and ending in 1991, Mr. Poel and Respondent paid Mr. Gullo over $130,000.00 in "referral" fees.

Beginning in 1987 and continuing until May, 1991, Mr. Poel and Respondent also made additional payments totaling over $150,000.00 to other non-lawyers in exchange for case referrals. These were all fee-sharing arrangements similar to the one with Mr. Gullo.

Findings of Fact Concerning the Statute of Limitations

Respondent has raised an affirmative statute of limitations defense concerning counts one through three. The facts concerning that defense are as follows:

In the course of a nationwide investigation of the Teamsters

Union, a federal District Court appointed an investigation officer. In November 1991, the officer conducted a deposition of Mr. Gullo, in which he was asked questions about his arrangements with Respondent and Mr. Poel, As a result of false answers to the officers' questions, in 1995 Mr. Gullo was indicted for perjury. He pleaded guilty and was sentenced in 1996.

There was a newspaper article concerning Mr. Gullo's plea in the San Jose Mercury News on November 6, 1995. The article named Mr. Poel and Respondent as participants in the kickback scheme. An attorney for the State Bar read the article and initiated a State Bar Initiated (SBI) Investigation.

Correspondence between the State Bar, Mr. Poel's attorney, and Respondent's then counsel was exchanged. Mr. Poel and Respondent admitted all the facts of the scheme, and gave the State Bar documentary evidence of the payments. The State Bar's investigation file indicates that the Bar investigator tried to get permission to talk to Mr. Gullo, but apparently never did so. At all times, the investigatory file refers to this as an SBI

matter.

Conclusions

Statute of Limitations Defense

The Court rejects Respondent's defense that counts one through three are barred by the statute of limitations. Respondent acknowledges that the investigation into these counts was initiated by reason of a newspaper article read by an attorney for the State Bar un 1995. He also acknowledges that the statute of limitations contained in rule 51 of the Rules of Procedure of the State Bar applies only to investigations initiated by reason of a complaint from a person. However, he argues that Mario Gullo necessarily became the "complaining witness" in the matter once it was investigated, that the case could not have gone forward or been proven without him, and that rule 51 therefore applies to conduct which admittedly ceased in 1991.

Respondent's reasoning is faulty. Mario Gullo never complained about Respondent's misconduct. He had no reason to, since he was the beneficiary of Respondent's illegal scheme.

The case was easily proven without him; Respondent's former partner (as well as Respondent) admitted the entire matter, and supplied documentary evidence of all the transactions as well. In fact, there appears no evidence in the investigatory file that anyone from the State Bar ever spoke with Mr. Gullo. The investigation was initiated solely by the State Bar, by reason of the newspaper article reporting Mr. Gulio's conviction. It does not fall within the purview of rule 51.

Counts One through Three

As agreed by the parties to the stipulation, there is clear and convincing evidence that, by reason of paying kickbacks to Mr. Gullo for the referral of personal injury cases, Respondent wilfully violated rules 1-320(A) and 1-320(B), and 1-120 of the Rules of Professional Conduct, and rules 3-102(A) and 3-102(B) of the former rules of Professional Conduct (which were effective from 1975 until 1989), which rules prohibit a lawyer from splitting fees with a non-attorney. His actions also constituted conduct involving moral turpitude, in wilful violation of section

6106 of the Business and Professions Code.

In 1996, Respondent maintained a client trust account at a Wells Fargo Bank. On August 6, 1996, Respondent wrote a check from the account in the amount of $40,000.00; on August 8, 1996, he wrote a check from the account in the amount of $770.00. There were insufficient funds in the trust account to cover these checks. On November 21, 1996, Respondent commingled $1000.00 of his personal funds into the trust account.

Initially, Respondent claimed that the overdrafts were due to his bank improperly placing "holds" on deposits. This was not accurate. In his pretrial statement, Respondent admitted the trust account violations alleged in counts four and five. There is clear and convincing evidence that by writing checks against insufficient funds in his trust account on two occasions, and by commingling personal funds into his trust account, Respondent wilfully violated rule 4-100(A) of the Rules of Professional Conduct.

Findings of Fact in Counts Six through Eight

As a result of prior discipline, Respondent had been ordered by the Supreme Court to take and pass the Multistate Professional Responsibility Examination (MPRE) by February, 1998. He failed to do so. On February 25, 1998, he received an order from the Review Department of the State Bar Court, notifying him that he would be suspended from the practice of law on March 17, 1998, due to this failure.

Respondent claims that when he received this order, he placed a telephone call to Lisa Vorgias, a State Bar attorney who had handled one of his previous matters. He claims that Ms. Vorgias told him how to file a motion to stay the suspension, and stated that she would not oppose such a motion.

Ms. Vorgias's recollection is much different. She recalls speaking with Respondent, but not until much later, after she received a copy of the Review Department's April 10, 1998, order denying Respondent's motion.

In any case, Respondent attempted to file a motion for stay

of suspension on March 6, 1998. The motion was rejected for lack of proof of service. The motion was refiled and served on March 16, 1998. No response was filed by OCTC; Ms. Vorgias stated that she did not receive the motion, although it was properly served. Despite the lack of opposition, the Review Department denied the motion as moot on April 10, 1998.

Respondent had taken but not passed the March 1998 MPRE. He filed a second motion for relief from suspension on April 17, 1998. This motion was opposed by the State Bar on April 29, 1998. That motion was denied also. Thus, Respondent was completely unsuccessful in staying the suspension, which had taken effect March 17, 1998.

Despite having actual knowledge that he was suspended from the practice of law, Respondent represented a client in an arbitration on April 10, 1998, made a court appearance on April 10, 1998, completed the settlement of a case in late April, 1998, and appeared in another arbitration on May 4, 1998.

Conclusions:

Respondent's defense, that he was somehow misled by agents of the State Bar into believing that his suspension for failing to pass the MPRE would be stayed, is not accepted. Even if Respondent's recollection of events is credited, at most he was advised by an attorney from the State Bar that he would have to file a motion to get the suspension stayed, and that she would not oppose it. He did this, but his motions were denied. No agent of the State Bar could stay the suspension; only the Review Department of the State Bar Court could affect that action. Respondent had no reasonable basis to believe that he was entitled to practice law on the dates in question.

There is clear and convincing evidence that, while suspended from practice for failure to pass the MPRE, Respondent nevertheless practiced law on four separate occasions. This conduct clearly establishes that Respondent wilfully violated sections 6068(k), 6106, 6125, 6126(a), 6126(b), 6127 (a), 6127(b) and 6128(a) of the Business and Professions Code.

Appropriate Level of Discipline

The standards for Attorney Sanctions for Professional Misconduct (Standards) indicate that suspension or disbarment is the appropriate sanction for conduct involving moral turpitude, and for trust account violations. OCTC argues for disbarment. Respondent argues that only an a (sic) period of probation is warranted. Factors in mitigation and aggravation, as well as applicable case law, influence the decision as to what level of discipline is appropriate.

Mitigation:

Alcoholism:

Respondent testified, and has previously stipulated that he is an alcoholic. While he does not attempt to blame his misconduct on his addiction many of his decisions in the period from 1985 until 1996 were unfluenced by his drinking. Respondent has checked himself into the hospital for treatment for alcoholism at least three times since 1992. After the first two hospitalizations he remained sober for some period of time but

then returned to drinking. Respondent has now been sober since March 26, 1997. He takes antabuse medication. He attends Alcoholics Anonymous and the Other Bar several times a week. He has a sponsor. He appears to have a good network in place to support his continued sobriety. This factor will be taken into account.

Family and Medical Problems:

During the years 1995 to 1996, Respondent went through a divorce, which compounded personal and financial problems which had existed for some time. He does not point to these matters as excusing any of his misconduct, although they undoubtedly contributed to his inattention to his professional responsibilities. Respondent has also been diagnosed with acute depression, which has been controlled through medication since the fall of 1997. It was an episode of deep depression which caused Respondent not to take and pass the MPRE in a timely fashion, resulting in his suspension from practice in 1998.

Staleness of Gullo Matter:

Although not barred by the statute of limitations, the Gullo matters are very old. The misconduct occurred from 1985 until 1991, and ceased eight years ago. The Court takes judicial notice that this factor was considered as mitigating by the parties when they settled the case involving Respondent's former partner, Mr. Poel.[1]

Cooperation:

OCTC argues that Respondent has not been cooperative in this matter. The Court disagrees.

When the Gullo matter first came to the State Bar's attention, Respondent and former partner hired an investigator to review their records and obtain all the documentary evidence of the transactions.

Additionally, Respondent stipulated to the facts regarding culpability in this matter, saving OCTC and the Court valuable

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1 The Court notified the parties at the June 3, 1999 trial that it would take judicial notice of the stipulation in the Poel matter. OCTC's motion to reconsider, by way of letter brief, is denied.

trial time. The Court has found Respondent to be respectful and cooperative.

Pro Bono Activities:

Respondent has acted as a judge pro tempore for the courts in which he regularly appears for many years. He also offers pro bono legal assistance to other members of the Alcoholics Anonymous meetings. These contributions to the community are entitled to mitigating weight.

Aggravation:

Prior History:

Respondent has a prior history of discipline. In the matters resulting in Supreme Court Order SO56769, effective February 6, 1997, Respondent stipulated that he failed to communicate with a client in 1989, failed to pay and report sanctions in 1991, failed to properly withdraw from a case in 1993, failed to report other sanctions in 1994, and received a second conviction for driving under the influence in 1995. The agreed-upon discipline was a stayed six month suspension and two years of probation.

In 1998, Respondent was found to have violated his probation in the earlier matter by failing to file one probation report on time, and attending Ethics School late. For this misconduct, Respondent received an actual suspension for sixty days.

Multiple acts:

Respondent acknowledged that while suspended from practice for failure to pass the MPE, he retained sixty client files, did not work on them, and did not advise his clients of his suspension. The Court considers this conduct to have been less than forthright. However, it must be noted that Respondent was under no court order or rule which obliged him to notify any courts or clients of his administrative suspension for failure to take and pass the MPRE.[2] There is no evidence that his conduct caused harm to any client or case. The Court does not view this

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2 The State Bar Court has only the most limited of authority, under present rules of court, to order compliance with rule 955 of the Rules of Court. It has no such express authority in connection with administrative suspensions for failure to take and pass the MPRE.

conduct as being the extremely serious aggravating factor which OCTC argues that it is.

Harm Resulting from Acts of Moral Turpitude

An important factor where an act of moral turpitude has been committed is the degree to which the victim of the act is harmed. Here, Respondent's moral turpitude finding is based on the kickback scheme which he and Mr. Poel arranged with Mr. Gullo and others. There is no showing that any of the clients referred as a result of this arrangement were harmed. Respondent testified that all of their cases were handled properly, and that they received the full amounts owing to them from the settlement or resolution of their cases. All payments to Mr. Gullo and the others came from Respondent's and Mr. Poel's fees. (The Court takes judicial notice that the parties agreed in Mr. Poel's stipulation that no clients were harmed.)

However, while their (sic) was no direct harm to clients, there was harm to the partner in the kickback arrangement. When the "beneficiary" of the scheme lied about it under oath,

apparently to protect Respondent and Mr. Poel, he resigned from his union office and suffered a perjury conviction. Although Respondent and Mr. Poel paid his attorney's fees, and paid him a civil settlement, those payments cannot make up for the fact of his criminal conviction or the effect on his reputation.

There was also harm in a broader sense to the administration of justice. The public policy of the State of California is that attorneys may not split fees with non-attorneys. As applied in the present situation, that policy furthers the goal of having members of the public freely choose their legal representatives. Unsavory kickback arrangements such as this one significantly harm the reputation of the legal profession and the public's perception of the legal system.

Lack of Deceit:

Another factor to be considered is the extent to which the act of moral turpitude was carried out through dishonesty and deceit. Here, although the kickback scheme itself was illegal, it was carried out with remarkably little guile. Mr. Gullo was paid

with checks, and 1099 tax forms were filed on his behalf. When the State Bar inquired, these records were promptly turned over. Thus, no aggravating factor of surrounding dishonesty is found.

Discussion:

The misconduct in the present matter both predates and spans the period of time during which

Respondent committed prior misconduct. The violations in the Gullo matter lasted from 1985 until 1991. There appears to be no reason why the Gullo matter could not have been tried or settled with the matters involved in Respondent's prior disciplinary case, (sic) in 1996. That matter must be evaluated together with the earlier matters, rather than against the background of a prior history of discipline.

The 1996 trust account violations are more troubling. They occurred shortly after Respondent had agreed to the stipulation in the first disciplinary matter. Even if inadvertent, these violations show a lack of concern over the proper operation of a client trust account. Further, although Respondent agreed to

seek treatment for his alcoholism in the 1996 stipulation, he now states that he has been sober only since March of 1997. Respondent's agreement in the first disciplinary matter appears to have had little impact on his willingness to meet his professional obligations.

Most troubling are Respondent's decisions to continue practicing law even though he knew he was suspended from practice, (sic) in 1998. That conduct occurred repeatedly, after Respondent had been sober for a year, after he had received treatment for depression, and while he was well aware how seriously the State Bar considered violation of the conditions of his probation. Respondent's actions show a disregard for the orders of the Supreme Court and the Review Department of the State Bar Court.

In asking for a disbarment recommendation, OCTC relies upon the cases of Morgan v. State Bar (1990) 51 Cal. 3d, 598, and In the Matter of Taylor (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563. The misconduct in Morgan was dissimilar, and

more serious than the misconduct here.

Although unauthorized practice of law was involved, as here, Mr. Morgan's additional offense was gaining a pecuniary advantage over a client through use of her credit cards, which did involve deceit and harm to the client. He had four prior disciplinary proceedings for extremely serious misconduct, including misappropriations of client funds, which had resulted in accumulated suspensions of two years and probation over eleven years. Here, Respondent's only prior disciplinary suspension was for sixty days, for probation violations, and his previous probation was for two years.

In the Taylor matter, the essential distinguishing factor is that it proceeded as a default, which always causes a grave concern that the attorney has completely abandoned any attention to his professional responsibilities. That appeared from the record to have been the case with Mr. Taylor, who not only practiced law while suspended, but deceived his client and the court while doing so, and additionally failed to communicate with

clients, return unearned fees, files, and papers. He had recently been suspended for six months in a proceeding in which he also did not participate. That situation is readily distinguishable from the present matter, in which respondent has participated.

The Court agrees with OCTC that a severe sanction is warranted in this case. However, it does not agree that any sanction less than disbarment will be effective. It must be remembered that the purpose of discipline is not punishment of the attorney, but rather protection of the public, the courts, and the reputation of the legal profession. (E.g. Chadwick v. State Bar (1989) 49 Cal. 3d. 103, 111.) It is true that Respondent violated his earlier conditions if probation. However, those violations were the result of Respondent's misunderstanding of the requirements, rather than an intentional desire to ignore his obligations.

The Court concludes that a lengthy period of actual suspension and a lengthy period of probation, which will require Respondent to remain sober, and in treatment, are the appropriate

remedy in this matter. Respondent is warned that this is in every respect his last chance to retain his license to practice law. If he commits any violation of the terms of his probation, or again practices law while on actual suspension from practice, the inevitable result will be his disbarment.

RECOMMENDATION

For the reasons stated, it is recommended that Respondent be suspended from the practice of law for three years, and until he has made the showing of rehabilitation, fitness to practice, and knowledge, and ability in the general law required by standard 1.4(c)(ii), that execution of that suspension be stayed, and that Respondent be placed on probation for four years with the following conditions:

1. That for the first year of probation, Respondent shall be actually suspended from the practice of law.

2. During the period of probation, Respondent shall comply with the provisions of the State Bar Act

and Rules of Professional Conduct.

3. Subject to assertion of applicable privileges, Respondent shall answer fully, promptly, and truthfully any inquiries of the Probation Unit of the Office of Trials which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with these terms of probation.

4. Respondent shall promptly, and in event after more than ten (10) days, report to the membership records office of the State Bar and to the Probation Unit, Office of Chief Trial Counsel, 1149 S. Hill Street, Los Angeles, all changes of information, including current office or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

5. Respondent shall report not later than January 10,

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April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Unit, Office of the Chief Trial Counsel, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury:

(a) in his first report, whether he has complied with all the provisions of the State Bar Act, (sic) and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, whether he has complied with all the provisions of the State Bar Act, (sic) and Rules of Professional Conduct during said period;

(c) in a final report to be filed no earlier than twenty days before the termination of his probation, that he has complied with all the

provisions of the State Bar Act, (sic) and Rules of Professional Conduct.

6. Respondent shall abstain from the use of any alcoholic beverages, (sic) and shall not use or possess any narcotics, restricted drugs, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription. Respondent shall continue to attend at least four meetings per month of Alcoholics Anonymous, the Other Bar, or a similar counseling session which has as its purpose the maintenance of Respondent's sobriety. Respondent shall provide satisfactory proof of attendance during each month to the Probation Unit in his quarterly reports.

7. Respondent shall continue his treatment for depression with a duly licensed psychiatrist, psychologist, or clinical social worker, at his own

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expense. He shall provide evidence to the Probation Unit of his treatment in his quarterly reports. If the psychiatrist, psychologist, or clinical social worker determines that Respondent no longer requires treatment for depression or other mental infirmity, Respondent may file a motion for modification of this condition with the Hearing Department of this Court attaching a written statement from the psychiatrist, psychologist, or clinical social worker, certifying by affidavit under penalty of perjury that no further reports are required.

8. It is not recommended that Respondent be ordered to attend Ethics School or Trust Accounting School again, as he ha[illegible]cently done so.

9. The period of probation shall commence as of the date on which the order of the Supreme Court

imposing discipline in this matter becomes effective.

10. At the expiration of the period of this probation, if Respondent has complied with the terms of probation, the order of the Supreme Court suspending Respondent from the practice of law for a period of four years shall be satisfied and that suspension shall be terminated.

It is not recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order in this matter, as he has recently done so.

It is recommended that Respondent be ordered to comply with the requirements of Rule 955 of the California Rules of Court within thirty calendar days of the effective date of the Supreme Court order imposing discipline in this matter, and file the affidavit provided for in paragraph (c), showing his compliance with said order, within 40 days of the effective date

of said Supreme Court order.

COSTS

It is further recommended that costs be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of that Code.

Dated: June 14, 1998

Nancy Roberts Lonsdale
Judge of the State Bar Court

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THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of	Docket No. S081332
	State Bar Case No. 85-0-12550
CHARLES H. KAVALARIS	**Verified Petition for Writ of Review**
	Ca. Rules of Court, Rule 952
No. 46853 Member of the State Bar	

I.

Introduction

The Petitioner, Charles H. Kavalaris, an attorney at law for twenty nine years, petitions for review of the recommendation of

the Honorable Nancy Lonsdale, Hearing Judge of the State Bar's Court. Said recommendation requests the issuance of an order by this Court imposing a one year actual suspension of the Petitioner's twenty nine year license to practice law. Exhibit A. The Petitioner asserts said recommendation is unlawful and erroneous.

The transcript of the trial has been ordered and payment for the same has been made. Exhibit B. This Petition must be submitted without the transcript due to time constraints, because the transcript has not yet been received. Exhibit B. Issues and argument contained in this Petition are limited to the written exhibits and court orders of which judicial notice is required. [1]

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[1] California Evidence Code section 452 provides for judicial notice of records on file with courts. As held in **People v. Preslie** (1977) 70 Cal. App.3d 486, 493, 138 Cal. Rpt. 828,"It is manifest that section 452, subdivision (d). by its terms authorizes taking judicial notice of records on file in the action before the trial court whether or not they are in evidence in the proceedings and whether or not the trial judge relied upon them." California Evidence Code section 452 (d) states that "Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

The hearing judge erred as a matter of law in issuing the recommended one year actual suspension. She punished the attorney and denied him equal protection of the law by punishing the attorney for his sustained period of proven rehabilitation from alcoholism for two and a half years. She denied the attorney a fair hearing and punished him for his disease instead

The hearing judge denied the attorney the equal protection of the law in failing to mention and weigh the following mitigating factors which are recognized in the Standards for Attorney Sanctions for Professional Misconduct as circumstances which shall be considered mitigating factors in arriving at the proper disposition of the case: the absence of a prior record for fifteen years of the attorney's twenty nine years of practice; the good faith of the member; the lack of harm to a client or person who is the object of the misconduct; extreme emotional difficulties and physical illness and clear and convincing evidence that the attorney no longer suffers from such difficulties or disabilities; spontaneous candor and cooperation displayed to the

victims of the misconduct and to the State Bar during the disciplinary investigation and proceedings; objective steps taken to spontaneously demonstrate remorse and recognition of the wrongdoing found or acknowledged which steps were designed to timely atone for any consequences of the misconduct; the passage of considerable time since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation; and excessive delay in conducting the disciplinary proceedings, which delay was not attributable to the member and which delay prejudiced the attorney. The hearing judge failed to credit the above mitigating factors, although the attorney has been an attorney at law for almost three decades without any misconduct except for the acts described herein for a limited period of time. The equal protection of the law was violated by the recommendation which issued from a judge who exhibited her bias against recovering alcoholics by misstating the records and refusing to provide the petitioner attorney any credit for the above eight mitigating factors which are contained in her

recommendation but for which no credit in the one year actual suspension recommendation was provided.

Precedent indicates that the disposition recommended should have been a maximum of a ninety day period of actual suspension.

A. Grounds for Review

Pursuant to California Rules of Court, Rule 954 review of the recommendation of the Honorable Nancy Lonsdale of the State Bar of California is (1) necessary to settle important questions of law, (2) petitioner did not receive a fair hearing, 3) the recommendation is not supported by the weight of the evidence and 4) the recommended discipline is not appropriate in light of the record as a whole.

B. Important Questions of Constitutional Law

This Petition is filed pursuant to California Rules of Court, Rules 952(a) concerning review of decisions of the State Bar Court of the State Bar of California. This Petition is filed as the constitutional issues concern 1) the denial of the equal protection

of the law by a hearing judge's discriminatory and biased treatment against a recovering alcoholic and refusal to follow precedent, 2) the denial of a fair procedure by the State Bar of California, and 3) the denial of lawful notice of prohibited and required acts in violation of the fair notice doctrine.

Due to the importance of these United States constitutional issues, this Petition should be entertained as the recommendation based on the clear errors of law by the Honorable Nancy Lonsdale of the State Bar Court of the State Bar of California render the recommendation unconstitutional under the mandates of the United States Constitution.

II.

The One Year Actual Suspension Recommendation is Unlawful and Erroneous

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. **Chadwick v. State**

Bar (1989) 49 Cal 3d 103, 111; **Cooper v. State Bar** (1987) 43 Cal 3d 1016, 1025; standard 1.3. Before imposing discipline, an independent review must be conducted to determine whether the recommended discipline is appropriate. (**In re Ford** (1988) 44 Cal.3d 810, 815 [244 Cal. Rpt. 476, 749 P.2d 1331].) In arriving at an appropriate discipline, all relevant factors, including mitigating circumstances, must be balanced on a case-by-case basis. (**Schneider v. State Bar** (1987) 43 Cal.3d 784, 798 [239 Cal. Rpt. 111, 739 P.2d 1279].) The discipline ultimately imposed must be consistent with its purpose, that of protecting the public, the courts, and the legal profession from unfit practitioners. (**In re Nevill** (1985) 39 Cal.3d. 49 Cal. 3d 257, 776 P.2d 1021.

F. The One Year Actual Suspension Based on Prior History is Unlawful and Excessive

The one year actual suspension recommendation lists under "Aggravation" that there is a "Prior History." It then recites a prior probation order of 1997 and a claimed violation of the probation order of 1997 as prior history. Exhibit A:9, para. two and three. However, the recommendation states that, "The

misconduct in the present matter both predates and spans the period of time during which Respondent committed prior misconduct. The violations in the Gullo matter (fee-splitting matter) lasted from 1985 until 1991. There appears to be no reason why the Gullo matter could not have been tried or settled with the matters involved in Respondent's first disciplinary case, in 1996. The matter must be evaluated together with the earlier matters, rather than against the backdrop of a prior history of discipline." A:11:24-27, 12:1-4.

The attorney's closing brief makes clear that in 1996 when the prior matter was pending, the attorney sought to consolidate the matters as the attorney admitted culpability of the fee-splitting charges, but the State Bar prosecutor prevented consolidation. Exhibit D:3: para. two states that, "...Trial Counsel... overlooks the fact that Respondent immediately and unequivocally accepted responsibility for the Gullo matters and overlooks his former lawyer's repeated requests to resolve this matter by consolidating Gullo with other matters which was

rejected out of hand by Lisa Vorgias (State Bar deputy trial counsel)." While the hearing judge stated that the prior history should not be an aggravating factor as the matters should have been consolidated and heard together, she, in fact, treated the matters as separate and the former matter as a prior aggravating discipline record which was unlawful and erroneous.

G. The One Year Actual Suspension based on a Prior History of a Probation Violation when There was no Actual Notice of the Probation Terms is Unlawful and Excessive

The petitioner was admitted to the practice of law on June 26, 1970. After twenty seven blemish-free years of practicing law, the 1997 disposition provided for a stayed suspension and two years of probation (Exhibit C). The acts of misconduct were not returning a client's phone call or answering a client's letter in 1992, not reporting two sanctions' orders in 1991 and 1994 although they had been reported to the State Bar, being one month late in paying a sanction order in 1991, paying a sanction order to the wrong party in 1991, not obtaining a court order withdrawing from employment earlier than in 1993, although

there was no showing of prejudice to a client, and being convicted of driving under the influence of alcohol in 1995.[2] There were no mitigating factors listed other than the attorney's then twenty seven year period of blemish-free practice. Exhibit C:36; State Bar Exhibit 4-0036.

The attorney was subject to a California Supreme Court

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"Beginning in August 1992, Mr. Barba left phone messages for respondent to call him back. By letter dated October 27, 1992, Mr. Barba requested in writing a status report on his case. Respondent failed to respond to these communications." (Exhibit C-18; State Bar Exhibit 4-0018) The attorney was ordered to pay $2,000.00 sanctions or $1,000 to the County and $1,000 to a Dr. Levin by June 30, 1991. In July of 1991 he paid $2,000 to the County. Three years later Dr. Levin demanded $1,000. "Respondent reasonably believed that his obligation to Dr. Levin had been met by his previous payment to the County... [He] promptly paid Dr. Levin. ... Respondent wilfully violated section 6068(b) and 6103 in that he failed to promptly pay the court-ordered sanctions." Exhibit C-20; State Bar Exhibit 4-0020). Respondent failed to report the sanctions. "He reasonably believed that the sanctions had been reported to the State Bar because he received a copy of the referral letter from the Superior Court to the State Bar.... Respondent wilfully violated ...section 6068(o) by failing to report the court-ordered sanctions to the State Bar." Exhibit C-23; State Bar Exhibit 4-0023). "In June of 1993, respondent requested permission of his client to withdraw...when that permission was denied, [he] petitioned the court for permission to withdraw... [A]rbitration dates were pending. By failing to request permission of his client, or alternatively by failing to request permission of the court, prior to June, 1993 respondent violated Rule.... 3-700(A)(2)." Exhibit C-25:23-28, 26; State Bar Exhibit 4-0025-26.) Respondent failed to report $1,075.00 in sanctions. At the time, [the client] had already complained to the State Bar. Exhibit C-28; State Bar Exhibit 4-0028). Respondent was convicted of driving under the influence of alcohol in 1995 with a prior conviction. Exhibit C-30-31; State Bar Exhibit 4-0035-36).

order which did not list any probation conditions. Exhibit C-1 (State Bar Exhibit 4-0001). The California Supreme Court order stated that the attorney was "placed on probation for two years subject to the conditions of probation as recommended by the Hearing Department of the State Bar Court in its Order Regarding Stipulation filed August 27, 1996." Exhibit C-1 (State Bar Exhibit 4-0001). The Hearing Department Order Regarding Stipulation was not served on the attorney, but solely on his counsel of record. Exhibit C-57 (State Bar Exhibit 4-0057).

The lack of actual notice of the probation conditions imposed on an attorney is a serious due process problem in the State Bar system and appears to be unconstitutional. A probationer is entitled to actual notice of each probation condition provided to him by a judge in open court, a probation officer, and a meeting with a probation officer explaining each probation condition and how to comply before said probation conditions are enforceable. As held in **Pollard v. United States** 352 U.S. 354; 77 S. Ct. 481; 1 L. Ed.2d 393 (1957), the absence

of an accused from the courtroom when probation is imposed invalidates the judgment and probation order. Fed. Rules Crim. Proc., 43.[3]

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[3] Attorney disciplinary proceedings are quasi-criminal in nature. **In re: Ruffalo** 390 U.S. 544, 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d. 117 (1968). Probation is a criminal disposition subject to the due process rights of a criminal proceeding. "The right to be present at the return of a verdict is rooted in the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. **United States v. Gagnon**, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985); see **also Snyder v. Massachusetts**, 291 U.S. 97, 105-06, 78 L. Ed. 674, 54 S. Ct. 330 (1934) A defendant is constitutionally "guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." **Kentucky v. Stincer**, 482 U.S. 730, 745, 96 L. Ed. 2d 631, 107 S. Ct. 2658 (1987). See Ariz. R. Crim. P. 19.2 ("The defendant has the right to be present at every stage of the trial, including ... the return of the verdict.") As stated in **In re Klein** 197 Cal. App. 2d 58; 17 Cal. Rpt. 71 , (1st App. Div. 1 1961), at 64, "The right to be present when sentence is pronounced derives from the common law. **Schwab v. Berggren** (1891) 143 U.S. 442, 446-448 [12 S. CT. 525, 36 L. ED. 218].)" The Court in **In re Perez** 65 Cal. 2d 224; 418 P.2d 6; 53 Cal. Rpt. 414 (1966), at 229, stated that, "There are substantial reasons for the presence of the accused and the aid of counsel at the pronouncement of judgment. There may be good cause why judgment should not be pronounced (Pen. Code, @ 1200), e.g., the accused may be insane or have cause to offer in arrest of judgment or for a new trial (Pen. Code, @ 1201); he may have evidence and argument in mitigation of punishment when a choice of sentence is available; when probation has been revoked in his absence he may be able to show that it should be reinstated.... Thus, **In re Klein, supra**, 197 Cal. App.2d at pp. 62, 65, specifically held that pronouncement of judgment under the provision of section 1203.2a purporting to authorize sentencing in the absence of defendant violated the rights 'to appear and defend, in person and with counsel' (Cal. Const., art. I, @ 13), and that acceptance of probation by the accused did not imply acquiescence in that provision of section 1203.2a and waiver of those constitutional rights." If judgment is pronounced in his [the accused's] absence, and no justifying

Since the attorney was never present when probation terms were first recommended and then imposed and the California Supreme Court order does not set forth the probation terms as is required for their enforceability,[4] the claim that a prior history of

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circumstances are shown, the judgment must be set aside. (**People v. Brown, supra** [(1951) 102 Cal. App.2d 60 [226 P.2d 609].; **People v. Fields**, 88 Cal. App.2d 30, 33 [198 P.2d 104]; **In re Klein** 75 Cal. App.2d 600, 603 [171 P.2d 471]; **People v. Hawthorne**, 63 Cal. App.2d 262, 264 [146 P.2d 517]; see **People v. Williams**, 24 Cal.2d 848, 853 [151 P.2d 244]; **Staples v. Commonwealth**, 140 Va. 583, 587 [125 S.E. 319]; **Siegel v. State**, 201 Wis. 12, 17 [229 N.W. 44]; cases collected in 24 C.J.S., Criminal Law, @ 1574). Since the accused attorney was not present when the California Supreme Court issued its judgment nor was he present when the State Bar's court recommended any probation terms, the prior history of a probation violation proceeding should be struck as the probation conditions of the ethics school and the quarterly reports were not lawfully imposed.

4 Article VI, section 14 of the California Constitution provides in pertinent part, "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." The order has no reasons stated. In **People v. Grant** 113 Cal. App. 3d 457; 170 Cal. Rptr. 218 (3rd App. 1980), the court invalidated probation when the judge just read into the record the probation report. The Court stated that, "Where a court (as here) attempts to support its sentence choice by merely reading the probation officer's report into the record while stating neither the "primary factor or factors that support the exercise of discretion" (Cal. Rules of Court, rule 443) nor the "ultimate facts which the court deemed to constitute circumstances in aggravation" (Cal. Rules of Court, rule 439(c)), it falls well short of its statutory duty." In this case, the order does not read into the record the offense, the reasoning behind the disposition, the probation terms, or why the probation terms that are not specified are required. The attempt to claim there was a probation order and that certain unspecified terms were in such an order must fail. The order has none of the claimed terms. There are no reasons stated.

a probation violation should be treated as an aggravating factor is unlawful and excessive. The claimed probation terms were not valid, having been entered in the absence of the accused attorney and never served on him.

It denies due process and the equal protection of the law to claim that the California Supreme Court order may violate the express mandate of the California Constitution and the Court's duty to specify the offense, the factors, the exact terms of probation, and why the probation terms were being imposed in this case. "The threshold prerequisite to an equal protection claim, however, is unequal treatment of persons who are similarly situated." (**People v. Jerex** (1989) 208 Cal. App. 3d. 132, 138-139). "The Equal Protection clause imposes a requirement of some rationality in the nature of the class singled out." **James v. Strange** 407 U.S. 128, 140 (1972), quoting **Rinaldi** 384 U.S., at 308-309, and that rationality is absent here..... giving preference to a discrete class merely to accomplish the elimination of hearings on the merits, is to make the very kind of

arbitrary legislative choice forbidden by the Equal Protection Clause. **Reed v. Reed** 404 U.S. 71, 76 (1971)." **Logan v. Zimmerman Brush Co.** 445 U.S. 442, at 442 (J. Blackmun concurring). Since all other probationers are entitled to be present, to a statement in the presence of the accused by a judge of a constitutional court as to the factors involved in the disposition and a statement of what the probation terms are with exactitude, and why those specific terms are required, and the Constitution required that the California Supreme Court state its reasons in writing for such terms, and it failed to do so, the claimed probation order did not conform to the requirements of due process or of equal protection of the laws, and was therefore unenforceable. It is not an aggravating factor as it was constitutionally infirm and unenforceable.

The recommendation states in relying on this claim of a prior history that "In 1998 Respondent was found to have violated his probation in the earlier matter by failing to file one probation report on time, and attending Ethics School late. For

this misconduct, Respondent received an actual suspension of sixty days." Exhibit A:9: three para. The recommendation states that, "It is true that respondent violated his earlier conditions of probation. However, those violations were the result of Respondent's misunderstanding of the requirements, rather than an intentional desire to ignore his obligations." Exhibit A:13: para. three. There was no actual notice of the probation terms in any court order served on the attorney. This renders the probation terms unconstitutional. This renders the claim of a prior history based on a claim of such probation violations unlawful and excessive.

H. The Extensive Record of Rehabilitation from Alcoholism and Family Problems was Entitled to Great Weight as a Mitigating Factor and It was an Error of Law to Treat them as Aggravating Factors

The recommendation issuing from hearing judge Nancy Lonsdale is biased against those suffering from and who have recovered from alcoholism, even though it is acknowledged by this Court that alcoholism is a disease. This Honorable Court has

stated that, "[A]ccording to a consensus of the medical community, alcoholism is a treatable disease." See **Sundance v. Municipal Court** (1986) 42 Cal. 3d. 1101, 1114-1115, 232 Cal. Rpt. 814, 729 P. 2d. 80).

Through continued abstinence, an alcoholic may arrest the deleterious manifestations of the disease. Hundreds of thousands of Americans are recovering alcoholics, completely abstinent from alcohol or other mind-altering chemicals. (Alcoholic's Anonymous World Services). An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her drug problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous. (See **In re: Kersey** (D.C. App. 1987) 520 A. 2d. 321, 325-326." **Billings v. State Bar of California** (199) 267 Cal. Rpt. 319, 324.

While the case law from this Honorable Court indicates that two and a half years of sustained abstinence and recovery, and daily and weekly programs of rehabilitation with Alcoholic

Anonymous and other programs is a substantial mitigating factor in determining what is the appropriate disposition concerning the need to protect the public, hearing judge Nancy Lonsdale treats such recovery as an aggravating factor, rather than a laudable mitigating factor. See **Howard v. State Bar** (1990) 51 Cal. 3d. 215, 270 Cal. Rpt. 856, 793 P. 2d. 62. In her recommendation, she states that, "Further, although Respondent agreed to seek treatment for his alcoholism in the 1996 stipulation, he now states that he has been sober only since March of 1997. Respondent's agreement in the first disciplinary matter appears to have had little impact on his willingness to meet his professional obligations." (Exhibit A-12:8-13).

The attorney did comply with his professional obligations under the exact language of the stipulation. Ms. Lonsdale misstated the order and the attorney's compliance. She misrepresented the facts. The stipulation stated that, within thirty days of the effective date of the order, the attorney would provide evidence of his enrollment in a program of substance abuse

recovery. Exhibit C-2. (State Bar Exhibit 4-0052,) third paragraph. Said order went into effect on February 6, 1997. Exhibit C-1 (State Bar Exhibit 4-001). The attorney enrolled in the substance abuse recovery program by March 7, 1997, or within the thirty day required period, and the decision acknowledges that the attorney has now been sober for over two years since March 26, 1997. Exhibit A:8:2. This Honorable Court has indicated that rehabilitation, recovery, and sobriety for over two and a half years is a factor which is entitled to substantial mitigating weight rather than condemnation and punishment. As stated by this Honorable Court in **Howard, supra**, at 858," The referee... credited expert testimony that [the attorney] fell in the highest percentile of those whose recovery programs were likely to be successful, particularly since she had been sober for more than two years. He concluded that her chemical dependency was well under control and predicated that, under appropriate supervision, it would continue to do so." Attorney Howard received a six month actual suspension when

the standards provided for a one year actual suspension for misappropriation of client funds. Her sobriety for two and a half years before the hearing, which is the same as this Petitioner, was lauded and given substantial mitigating weight in reducing a normal one year actual suspension to a six months actual suspension. Instead, Nancy Lonsdale increased an appropriate disposition of a ninety day actual suspension to a one year actual suspension, because she desired to punish the attorney for being an alcoholic who had been abstinent and in complete recovery for only two and a half years.

The hearing judge ignored the causal connection between the attorney's fee-splitting and failure to supervise his trust account concerning two returned checks and a $1,000 commingling deposit and his alcoholism and the attorney's recovery from the same. The hearing judge exhibited her bias and prejudice against the attorney as a recovering alcoholic with her demeaning statements about the attorney's illness and her misrepresentations of the facts and the orders to his detriment.

She misstated the facts as she thinks badly and poorly of any one who is so weak of character that he has the disease of alcoholism. The disease is a biochemical disorder over which an attorney has no control, in which he never can be cured, and where the only hope is for the attorney through massive support mechanisms on a daily basis to remain abstinent. That is what the attorney has done for over two and a half years. Instead of receiving laudable credit for his accomplishment and achievement, the hearing judge condemned his perceived weakness of character in suffering from the disease of alcoholism and not only accorded his successful rehabilitation no mitigating weight, but treated it as an aggravating factor instead. She said, "Respondent testified, and has previously stipulated, that he is an alcoholic. While he does not attempt to blame his misconduct on his addiction, many of his decisions in the period from 1985 until 1996 were influenced by his drinking. Respondent has checked himself into the hospital for alcoholism at least three times since 1992. After the first two hospitalizations he remained sober for some period of time but

then returned to drinking. Respondent has now been sober since March 26, 1997. He takes antabuse medication. He attends Alcoholics Anonymous and the Other Bar several times a week. He has a sponsor. He appears to have a good network in place to support his continued sobriety. This factor will be taken into account." Exhibit A:7:21: 26, 8:1-5.

The decision fails to provide any mitigating weight for the attorney's successful rehabilitation from his disease of alcoholism for over two and a half years. The attorney's law partner who also engaged in the fee-splitting arrangement with the same persons received probation. As stated in the recommendation, "The Court notified the parties at the June 3, 1999 trial that it would take judicial notice of the stipulation in the Poel matter." Exhibit A:8: footnote 1. Why should an attorney who engaged in the same conduct receive an actual one year suspension compared to probation for his law partner? The only consideration is that this attorney should be punished for being an alcoholic, and that is what the hearing judge did in the instant

case. She condemns the attorney for being so weak as to be hospitalized three times for treatment of his disease. She condemns him for remaining sober after two hospitalizations for "some period of time," but then "return[ing] to drinking." She is critical that he is so weak that he must take medication for his disease, must attend AA and the Other Bar several times a week, and must have a sponsor. This is a "good network," but it is not counted as a meaningful rehabilitation over a sustained period of time or something worthy of mitigating credit. It is "solely a factor taken into account." This evaluation is unlawful. The hearing judge exhibits bias and prejudice against those suffering from the disease of alcoholism. She refuses to apply the standards providing for substantial mitigating factor credit for a meaningful and sustained period of rehabilitation and recovery of an attorney from the disease of alcoholism. **Howard, supra.** Rules of Procedure of the State Bar of California, Title IV, part A, std. 1.2(e) (iv).

The attorney voluntarily stipulated to extensive

rehabilitation measures which resulted in the California Supreme Court order which took effect on February 6, 1997. He became completely clean and sober on March 26, 1997 and has remained so since then for over two and a half years. He voluntarily agreed to provide the State Bar with a physical address and a telephone number where he could be reached within twelve hours; to abstain from the use of any alcoholic beverages; to not use nor possess any narcotics, dangerous, or restricted drugs, or associated paraphernalia except with a valid prescription; to enroll in a program of substance abuse recovery which met with the approval of the Probation Unit, Office of the Chief Trial Counsel; to provide satisfactory evidence of his compliance with such program; to contract for, at his own expense, with a licensed medical laboratory facility capable of conducting tests and analysis of blood and/ or urine, which is certified by the National Institute on Drug Abuse that meets with the approval of the Probation Unit, or a hospital facility that meets with the approval of the Probation Unit, Office of the Chief Trial Counsel, so as to

be tested at the request of the State Bar within a twelve hour period of notification and provide the results from that approved laboratory or hospital facility screening within ten (10)days of receipt to the State Bar. He agreed to provide blood and/or urine samples to the approved laboratory or hospital facility in such manner as may be specified by the laboratory to ensure specimen integrity. He agreed to provide the Probation Unit any and all waivers necessary to allow the Probation Unit to verify with the approved laboratory or hospital facility the accuracy of reports submitted by him. He voluntarily agreed that his failure to submit a report when due, or his failure to submit a report that is consistent with the requirement of the condition of probation, or his submission of a substance abuse testing report which evidences the presence of a substance would be considered a violation of the abstinence provision of this condition of probation and a violation of probation.[5]

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5 The alcohol rehabilitation measures that the attorney voluntarily agreed to appear at Exhibit A:53-54 (State Bar Exhibit 4:0053-0054) as follows: ALCOHOL ABUSE\DRUG ABUSE CONDITIONS OF

These rehabilitation measures the attorney voluntarily

PROBATION, CURRENT ADDRESS AND TELEPHONE NUMBER-That Respondent maintain with the Probation Unit, Office of the Chief Trial Counsel, a current address and a current telephone number at which Respondent can be reached and respond within twelve (12) hours. ABSTINENCE-That Respondent shall abstain from use of any alcoholic beverages, and shall not use or possess any narcotics, dangerous, or restricted drugs, or associated paraphernalia except with a valid prescription. SUBSTANCE ABUSE TREATMENT PROGRAM-Within thirty (30) days of the effective date of the discipline ordered herein, the Respondent shall provide evidence to the Probation Unit, Office of the Chief Trial Counsel, of his enrollment in a program of substance abuse recovery which meets with the approval of the Probation Unit, Office of the Chief Trial Counsel. The Respondent must provide satisfactory evidence of his compliance with such program with each report required under these conditions. SUBSTANCE ABUSE TESTING-The Respondent shall be responsible for contracting, at his own expense, with a licensed medical laboratory facility capable of conducting tests and analysis of blood and/ or urine, which is certified by the National Institute on Drug Abuse that meets with the approval of the Probation Unit, or a hospital facility that meets with the approval of the Probation Unit, Office of the Chief Trial Counsel. That subject to the discretion of the Probation Unit, Office of the Chief Trial Counsel, the Respondent shall be contacted by telephone by a member of the Probation Unit staff, on a random basis, and directed to submit to an approved laboratory or hospital facility, screening of his blood/urine within twelve (12) hours of notification. Respondent shall provide the results from that approved laboratory or hospital facility screening within ten (10)days of receipt. The blood and/or urine samples shall be furnished by Respondent to the approved laboratory or hospital facility in such manner as may be specified by the laboratory to endure specimen integrity. The Respondent shall provide the Probation Unit any and all waivers necessary to allow the Probation Unit to verify with the approved laboratory or hospital facility the accuracy of reports submitted by Respondent. OTHER-Failure by Respondent to submit a report when due, failure to submit a report that is consistent with the requirement of this condition of probation, or submission of a substance abuse testing report which evidences the presence of a substance subject to the condition shall be considered a violation of the abstinence provision of this condition of probation and a violation of probation."

undertook, completed, and complied with in good faith for over two and a half years. In addition, as the recommendation acknowledges, the attorney "also offers pro bono legal assistance to other members of his Alcoholic Anonymous meetings." Exhibit A:9: para one. As is often the case with recovering alcoholics, the attorney also suffered the stress of a divorce in the years 1995 to 1996 which admittedly "contributed to his inattention to his professional responsibilities." Exhibit A:8: first para. As is often the case with sobriety for an alcoholic, the attorney was "diagnosed with acute depression, which has been controlled through medication since the fall of 1997." Exhibit A:8: first para. The attorney has made a demonstration of a 'meaningful and sustained period of successful rehabilitation." **Rosenthal v. State Bar** (1987) 43 Cal. 3d. [658] at 664, 238 Cal. Rptr. 394, 738 P. 2d. 1336. "By reliable evidence [the petitioner has indicated] that a long-standing addiction is permanently under control." **Gary v. State Bar** (1988) 44 Cal. 3d. 820, 828 [244 Cal. Rptr. 482, 749 P. 2d. 1336.] The

attorney presented clear and convincing evidence that he has successfully maintained a program of rehabilitation for a sustained period of time and in a meaningful manner. This should effectuate a reduction in the recommended one year actual suspension to a ninety day actual suspension as credit should be given to a twenty nine year attorney who has proven that he has rehabilitated himself physically and mentally from the effects of a normally fatal disease.

I. The Absence of a Prior Record for Fifteen Years was not Listed as a Mitigating Factor

The hearing judge did not find respondent's twenty nine years of practice as a mitigating factor, presumably because of his prior discipline. However, the prior misconduct occurred during the same time period as the present misconduct and both the prior and current misconduct occurred within a narrow time frame. Therefore, it is appropriate to consider respondent's approximate fifteen years of blemish-free practice prior to the first act of misconduct as a mitigating circumstance. **(Shapiro v State Bar** (1990) 51 Cal.3d 251, 259; *In the Matter of Burckhardt* (Review

Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350-351.) It was unlawful and erroneous for the hearing judge to fail to provide mitigating factor credit for the attorney's fifteen years of blemish-free practice of law.

Under standard 1.2(e)(I), even if the misconduct warrants an actual suspension, a long period of blemish-free practice is given great weight in determining the disposition so as to substantially reduce the period of actual suspension. **Chefsky v. State Bar** (1984) 36 Cal. 3d. 116, 132, fn. 10, 202 Cal. Rptr. 349, 680 P. 2d. 82, **Waysmann v. State Bar** (1986) 41 Cal. 3d. 452, 457, 224 Cal. Rptr. 101, 714 P. 2d. 1239. In **Gold v. State Bar** (1989) 264 Cal. Rptr. 125, the attorney did not file a lawsuit within the statute of limitations, misrepresented a settlement to his client, paid his own money to the client, and did not advise his client that she had recourse against him in legal malpractice. A recommended ninety day actual suspension was reduced to a thirty day actual suspension by reason of the fact that the attorney had practiced law without incident for twenty five years.

In **Friedman v. State Bar** (1990) 50 Cal. 3d. 235, 245, 266 Cal. Rptr. 632, 737 P. 2d. 359, at 637, the fact that the attorney had practiced law for more than twenty years with an unblemished record before the misconduct occurred was held to be "highly significant for purposes here." In assessing this factor's weight to be accorded, the court stated, **Friedman, supra,** at 637, that "it is a particularly strong mitigating factor in this case, given petitioner's substantial years of practice." In **Hawes v. State Bar** 274 Cal. Rptr. 2 (1990) the attorney was found culpable of six separate counts of abandonment of clients and of failure to return unearned fees. Because of his twenty year record, the recommended discipline was reduced to a one year actual suspension. In **Drociak v. State Bar** (1989) 278 Cal. Rptr. 86, the attorney used a pre-signed verification to answer interrogatories. This was considered a fraud on the court since the client did not actually see and sign the answers to the interrogatories such that the declaration under penalties of perjury submitted was false. Because of his twenty seven year blemish-

free career, Drociak received a thirty day actual suspension.

The fifteen year blemish-free period of practice of the attorney was entitled to weight as a mitigating factor to reduce the recommended one year actual suspension to a ninety day actual suspension. The hearing judge's failure to provide mitigating factor credit for the attorney's long period of blemish-free practice was a denial of the equal protection of the law and therefore unlawful and erroneous. **Aronin v. State Bar of California** (1989) 276 Cal. Rptr. 160, at 167.

J. The Absence of Subsequent Complaints was not Accorded any Mitigating Factor Weight

The trust violations occurred in the summer of 1996 and the commingling on November 21, 1996. Exhibit A:5: first para. The fee-splitting occurred from 1985 to 1991. Exhibit A: 2:20-23. The attorney not passing the Multi-State examination by two points occurred in March of 1998. Exhibit A: 6: para 13. The absence of any difficulties in the last year since the misconduct occurred "shows [that the attorney has] an ability to adhere to acceptable standards of professional behavior." **Cain v. State**

Bar (1978) 21 Cal. 3d. 523, 526, 146 Cal. Rptr. 737, 579 P. 2d. 1053. As in **In re: Highbie** (1972) 6 Cal. 3d. 562, 573, 99 Cal. Rptr. 865, 493 P. 2d. 97, where the attorney continued to practice law for over two years after his incarceration and successfully represented his clients' interests and obtained their trust in those two years, this was regarded as a significant mitigating factor. Four years of successful practice following the misconduct was credited as a mitigating factor in **Bradpiece v. State Bar** (1978) 21 Cal. 3d. 523, 526, 146 Cal. Rptr. 737, 579 P. 2d. 1053. Since the attorney has now been educated concerning his professional responsibilities by attending the State Bar Ethics School and being tutored for his successful completion of the Multi-State Professional Responsibility Examination, and there has been no new complaints since the deposit of his personal funds of $1,000.00 to the trust account in 1996, the absence of subsequent complaints should have been credited as a mitigating factor.

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K. No Weight was Accorded the Attorney's Objective Steps Spontaneously Demonstrating his Remorse and His Recognition of his Wrongdoing

The recommendation admits that the attorney took objective steps spontaneously to demonstrate his remorse and recognition that his fee-sharing arrangement with Mr. Gullo was wrong as were the trust violations. But the recommendation fails to accord this mitigating weight. The recommendation states that the petitioner and his law partner paid Mr. Gullo's attorney's fees voluntarily. It also states that petitioner and his law partner voluntarily paid Mr. Gullo a civil settlement. Exhibit A:11: para. one. The two trust checks that were processed by the bank, although there were insufficient funds, were promptly made good, and the attorney deposited $1,000 of his own money into the trust account so that there would be no possible overdrafts. The attorney also admitted the fee-splitting and the trust violations immediately. Exhibit A:5:10-18, 8:22-24, 9:1-9. When "an attorney displays candor, cooperation, and remorse throughout the disciplinary proceedings, and a willingness to

accept punishment and to rehabilitate himself," this is a significant mitigating factor. **Bradpiece v. State Bar** (1974) 10 Cal. 3d. 742, 748, 111 Cal. Rptr. 905, 518 P. 2d. 337, **Hipolito v. State Bar of California** (1989) 257 Cal. Rptr. 331, at 334. In **Chadwick v. State Bar of California** (1989) 260 Cal. Rptr. 538, at 541, this Honorable Court stated that, "[W]e believe, based on his testimony and his actions, that petitioner is remorseful and recognizes his wrongdoing. We consider this to be mitigating under standard 1.2(e)(vii)." Standard 1.2(e)(vii) provides that "circumstances which shall be considered mitigating are objective steps promptly taken by the member spontaneously demonstrating remorse, recognition of the wrongdoing found or acknowledged which steps are designed to timely atone for any consequences of the attorney's misconduct." As the recommendation states, but does not recognize as a mitigating factor, "When the Gullo matter first came to the State Bar's attention, Respondent and his former partner hired an investigator to review their records and obtain all documentary evidence of

the transactions. Additionally, they each fully admitted their role in the scheme. Mr. Poel was able to reach agreement with the Bar; for reasons which remain unclear, despite many attempts, Respondent was unable to convince the State Bar attorneys to reach a stipulation with him. Additionally, Respondent stipulated to the facts regarding culpability in this matter, saving OCTC and the Court valuable trial time. The Court has found Respondent to be respectful and cooperative." Exhibit A:8:22-24, 9:1-9.

While the attorney's cooperation in supplying all of the evidence against himself after hiring an investigator to gather the evidence for the State Bar and in immediately admitting his violations, paying the attorney's fees for Gullo and paying him a civil settlement voluntarily are in the record, the hearing judge denied the attorney the equal protection of the law in refusing to accord the attorney's demonstration of remorse and acknowledgment of his wrongdoing any mitigating weight.

L. The Passage of Considerable Time Followed by Convincing Proof of Subsequent Rehabilitation was not Credited

The acts that are involved are fee-splitting with a non-lawyer, two trust account checks which were paid against insufficient funds, a $1,000 personal deposit into the trust account to protect against overdrafts, and a claim of unauthorized practice of the law. The attorney admitted culpability of the first two items spontaneously and immediately. The third claim is that the attorney of twenty nine years who received no suspension order from his licensing court engaged in the unauthorized practice of law when he continued to use his license when an ex parte claim of a State Bar employee was mailed on February 25, 1998 claiming that he had taken the attorney's license effective in two weeks time, when the attorney had filed for a stay, honestly believed it was stayed, and had no notice in advance that a State Bar employee could constitutionally *ex parte* take his license. Refer Exhibits E-J. Prior thereto, the last act of claimed misconduct was in on November 21, 1996 when the attorney deposited $1,000 of his personal monies into his trust account to cover for any possible overdrafts. Exhibit A:5: para one. The

attorney became clean and sober on March 26, 1997 and has remained so for over two and a half years to the present time. Exhibit A:8, first sentence. There has been the passage of considerable time followed by convincing proof of subsequent rehabilitation. As in **Chadwick, supra**, at 544, this is entitled to mitigating weight. The Standards for Attorney Sanctions for Professional Misconduct provide that this is entitled to mitigating weight. Std. 1.2 (e)(viii). The recommendation fails to provide any mitigating weight for this factor in arriving at the one year actual suspension recommendation.

M. The Excessive delay in Conducting the Proceedings, which Delay was not Attributable to the Attorney and which Prejudiced the Attorney was not Credited as a Mitigating Factor

The Standards for Attorney Sanctions for Professional Misconduct provide that excessive delay in conducting the proceedings not attributable to the attorney and which prejudiced him is entitled to mitigating weight. This matter was subject to an investigation which commenced on November 6, 1995.

Exhibit A:3: third para. The attorney admitted culpability immediately. "When the Gullo matter first came to the State Bar's attention,... [the attorney and his partner) each fully admitted their role in the scheme." Exhibit A: 8:24, 9:1-4.

For four years the State Bar refused to process this matter. As stated in the recommendation, "...[T]he Gullo matters are very old. The misconduct occurred from 1985 until 1991, and ceased eight years ago. The Court takes judicial notice that this factor was considered as mitigating by the parties when they settled the case involving Respondent's former partner."

Exhibit A:8:16-21. Although this is a comment concerning "Staleness of Gullo matter," there is no mitigating credit in the recommendation provided this attorney, unlike the treatment that was accorded his former partner, for the excessive delay of the State Bar in conducting the proceeding when the attorney four years prior thereto had admitted culpability. Four years from admission of liability to trial is far too long a delay in conducting the proceeding. The attorney should not be penalized with a one

year actual suspension now when the State Bar deliberately delayed four years in bringing this matter to trial, and the acts of misconduct are now a decade old and are ancient history with the attorney leading an exemplary personal and professional life now for over two and a half years.

I. There was a Lack of Harm to Clients or Persons which was not Accorded any Mitigating Weight

The recommendation is unlawful as it fails to provide for the mandatory mitigating factor of no harm to any client or to the person who is the object of the misconduct. The Rules of Procedure of the State Bar of California, Standards for Attorney Sanctions for Professional Misconduct, state under Standard 1.2 (d) that, "Circumstances which shall be considered mitigating are:... (iii) lack of harm to the client or person who is the object of the misconduct." The misconduct found falls in three categories: fee-splitting with a non-lawyer, two trust account checks paid although there was insufficient funds and $1,000 of personal funds deposited into the trust account, and not passing

an examination in a year and continuing to practice law while there was no order from the licensing court prohibiting the same and a misunderstanding concerning a stay.

The recommendation taints the findings by claiming that the fee-splitting with a non-lawyer is "a kickback scheme." Exhibit A:4: para. 4, , A:10, para. Three. There was no kickback. There was no scheme. A portion of the attorney's fee was shared with a non-lawyer as a referral fee. Exhibit A:2, para. 17. A "kickback scheme" is "a bribe," or "a commercial bribe paid by a seller to a purchasing agent in order to induce the agent to enter the transaction." There was no evidence of a bribe. There was no evidence that the payment was to induce the agent to enter into a transaction with the attorney. Mr. Gullo was a teamster's official. The attorney was a member of the union. Gullo referred cases to the attorney and his partner. The attorney and his partner "paid Mr. Gullo with checks and 1099 tax forms were filed on his behalf." Exhibit A:11:20-21. While the hearing judge wishes to suggest that the referrals would not have been made to

the attorney and his partner unless a bribe was paid, there was no evidence of any bribe. The hearing judge's claims that this was a kickback scheme when there was no evidence of the same is reflective of her overreaction and failure to attend to the law as it is set forth. This was a fee-splitting arrangement which was prohibited by the rules of professional conduct, but it was not sinister nor illegal. The payments were open and obvious and made by check and the attorney prepared and filed tax forms indicating the payments made to Gullo.

The recommendation has a heading "Harm Resulting from Acts of Moral Turpitude." Exhibit A:10: para. three. It states that,"There is no showing that any of the clients referred as a result of this arrangement were harmed. Respondent testified that all their cases were handled properly, and that they received the full amounts owing to them from the settlement or resolution of their cases. All payments to Mr. Gullo and others came from Respondent's and Mr. Poel's fees. (The Court takes judicial notice that the parties agreed in Mr. Poel's stipulation that no

clients were harmed.) However, while there was no direct harm to clients, there was harm to the partner in the kickback arrangement. When the 'beneficiary' of the scheme lied about it under oath, apparently to protect Respondent and Mr. Poel, he resigned from his union office and suffered a perjury conviction. Although Respondent and Mr. Poel paid his attorney's fees, and paid him a civil settlement, those payments cannot make up for the fact of his criminal conviction or the effect on his reputation." Exhibit A:11: para. one.

There was no harm to any client or to any one who was the object of the fee-splitting arrangement. Gullo was not the object of the fee-splitting. He was the partner in it. There was no evidence that the attorneys suggested, condoned, or requested that Gallo lie under oath about the payments he received from the attorneys. There was no evidence that the attorneys suggested, condoned, or requested that Gallo resign from his office. There was absolutely no evidence that Gallo lied under oath to protect the attorneys. The attorneys did not know that they could not

pay referral fees under the rules of professional conduct. They paid Gullo by check. They filed Form 1099's with the IRS indicating that they paid Gullo the referral fees and sent the form to Gullo for him to attach to his income tax returns. As the recommendation admits, the payment of the fees to Gullo "was carried out with remarkably little guile." Exhibit A-11, third para. How can the independent intervening act of a third person, who is not a client and not the object of the misconduct, of lying, resigning from his job, and then being convicted of perjury for lying be possibly attributable to the attorney? There is no vicarious harm theory in quasi-criminal attorney disciplinary law. The harm to be charged to the attorney has to be caused by the attorney's act of professional misconduct, not by other acts of a third party that are completely independent of the attorney's act of professional misconduct. Gullo lied. That is not the attorney's fault. Gullo's lying was not a natural and necessary consequence of the fee-splitting. Gullo's resignation was not such a natural and necessary consequence of the fee splitting nor was his

conviction for perjury for lying. Gullo did those acts on his own.. The recommendation is unlawful as it claims harm is an aggravating factor, but there was no harm to a client or to the object of the misconduct as required for assessment of harm as an aggravating factor. The claimed harm was not the result of the attorney misconduct. It was the result of a third party's independent and intervening acts.

The recommendation asserts that "there is harm in a broader sense to the administration of justice. The public policy of the State of California is that attorneys may not split fees with non-attorneys. As applied in the present situation, the policy furthers the goal of having members of the public freely choose their legal representatives. Unsavory kickback arrangements such as this one significantly harm the reputation of the legal profession and the public's perception of the legal profession." The above is a non-sequitur. There was no unsavory kickback arrangement. There was payment of a referral fee after a case had concluded to a non-lawyer. No member of the public was

restricted in his or her selection of an attorney. Mr. Gullo's referral of clients to the attorney and his partner did not limit the choice of lawyers that the member of the public had. It augmented them. With the current proposal to undo the ban on splitting fees with a non-lawyer for multi-disciplinary practices of law and accounting, there is no natural harm to the public nor significant harm to the reputation of the legal profession and the public's perception of the legal profession by an attorney splitting fees with a non-lawyer. The prohibition on fee-splitting with a non-lawyer is directed at a lay person directing the exercise of professional judgment by a lawyer by causing the attorney to reject acceptable offers of settlement, because the attorney has to split the fee with a non-lawyer. That is the only harm that is envisaged from a fee-splitting arrangement. The recommendation indicates that no such harm occurred. Exhibit A:10, para. three.

III.

The Ex Parte Suspension by a State Bar Employee was Unconstitutional and Void

A significant United States constitutional issue is whether

the delegation of this Honorable Court's attorney licensing duties as a constitutional court of law to the private State Bar of California offends the basic precepts of due process of law and the equal protection of the law. The United States Supreme Court has held that "an attorney may not be excluded from the practice of law in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." **Willner v. Committee on Character & Fitness** (1963) 373 U.S. 96; 83 S. Ct. 1175; 10 L. Ed. 2d 224, at 102

This Honorable Court's 1997 order provided that the attorney was required to take and pass either the California Professional Responsibility Examination or the Multi-State Professional Responsibility Examination within one year of the effective date of the order, which was February 6, 1997. Exhibit C. This Honorable Court's order does not state that a lay person is going to take the attorney's license ex parte if the attorney did not pass the exam in the year.

This Honorable Court could have enforced its order by way

of a noticed contempt citation served on the attorney with a minimum thirty days provided to the accused attorney to file his response and have a hearing. The hearing would precede the punishment as is required for due process of law. **Armstrong v. Manzo** 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62 (1965). **Bell v. Burson** 402 U.S. 535, 29 L. Ed.2d. 90, 91 S. Ct. 1586, at 539 (1971). The hearing would be conducted on whether the attorney's non-compliance with this Honorable Court's order was willful and what, if any, sanctions should be imposed on the attorney.

An attorney is entitled to sufficient time to prepare and defend and fair notice of the facts relied on in support of a claim, so he may prepare and defend. **In re: Gault** 387 U.S. 31, 34, 18 L. Ed.2d. 527, 87 S. Ct. 1428 (1967). Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are in fact. See **In re Gault, supra,** at 33-34, and n. 54 (1967). Procedural due process rules were meant to protect persons not from a

deprivation, but from the mistaken or unjustified deprivation. **Carey v. Piphus** 435 U.S. 247, 259, 98 S. Ct. 1042, 1050, 55 L. Ed.2d. 252 (1978). Thus, they impose constraints on government action. **Mathews v. Eldridge** 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. ED. 2d. 18 (1976). In operation, due process requires notice of the cause or causes in sufficient detail and sufficient time to fairly enable a party to show any error that may exist, the right to be advised of the names and the nature of the violation alleged, the right to a meaningful opportunity to be heard in his own defense, and a hearing before a tribunal that both possesses some academic expertise and has an apparent impartiality towards the claims. **Pickering v. Board of Education** 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 1739 n.2, 20 L. Ed.2d. 811 (1968). See also **Goss v. Lopez** 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d. 725 (1975).

An accused attorney must be provided both procedural and substantive due process of law. He must be given written notice informing him of the specific issues that he must meet, at

the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. **In re: Gault, supra,** at 31-34. Had due process of law been applied, the attorney would have been provided notice of a proceeding to enforce the court order and to sanction the attorney for his non-compliance. He would have been provided the opportunity to present his defense, to wit, he was physically and mentally unable to take the examination. As a clean and sober recovering alcoholic, he had " an episode of deep depression which caused [him] not to take and pass the MPRE (Multi-State Professional Responsibility Examination) in a timely fashion..." Exhibit A:8: para. one. Instead the attorney's license was taken first by a State Bar employee ex parte on fifteen days notice with no advance notice, no hearing, no ability to defend, and no due process of law. Exhibit C. The employee claims that he is taking the license on the authority of a rule of court. Exhibit C. However, the California Constitution and the equal protection of that law guaranteed to the petitioner under the fourteenth

amendment to the United States Constitution prohibit a rule of court providing for substantive law rather than court procedure.

The Introductory Statement to the California Rules of Court states "Unless otherwise indicated, each rule in these California Rules of Court was adopted by the Judicial Council under its constitutional authority to adopt rules for court administration, practice and procedure not inconsistent with statute," or under express authority granted by the Legislature.

Article VI, Section VI of the California Constitution provides that "To improve the administration of justice the [Judicial] Council shall... adopt rules for court administration, practice and procedure, not inconsistent with statute."

A review of the legislation concerning the Judicial Council indicates there is no provision expressly authorizing it to decide any issues concerning the powers of the State Bar. The statutes and the case law clearly provide that,"the board [of the State Bar] has power to discipline members of the State Bar by reproval, public or private, or to recommend to the Supreme Court the

suspension from practice..," section 6077, and "the board [of the State Bar] has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproval, public or private, without such recommendation." section 6078. The statutes and case law indicate the State Bar may not suspend licenses. It may recommend action. It may not take action itself. It is a corporation and not a court of law. Article VI, section 9, California Constitution.

The United States Constitution prohibits the taking of an attorney's license by one who did not grant it. This Honorable Court grants the license. It is the only entity that may take it. He who grants the license is the only one who may take away is a fundamental precept of due process of law established by the United States Supreme Court over one hundred years ago. The United States Supreme Court in **Ex Parte Robinson** (1873) 86 U.S. 505; 22 L. Ed. 205; 19 Wall. 505, at 511 held that a court which did not admit the attorney had no power to disbar him. The

United States Supreme Court stated that, " This power (To suspend or disbar) is possessed by all courts which have authority to admit attorneys to practice." The State Bar and its claimed Court have no authority to admit an attorney to the practice of law. California Business and Professions Code sections 6000 et. seq.

The United States Supreme Constitution states that, "This Constitution and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby; and anything in the constitution or laws of any state to the contrary notwithstanding." Article VI, clause 2, United States Constitution. This Supremacy Clause mandates that this Honorable Court enforce the decisions of the United States Supreme Court which invalidate that portion of California Rules of Court, Rule 951(b) which states that, "The State Bar Court shall have the power ... to suspend a member for failing to take and pass such examination." The The State Bar and its Court do

not admit attorneys, so they may not constitutionally suspend them.

"The judicial function is to declare law and to determine rights of parties to controversies." **County of Contra Costa v. California**, 222 Cal. Rptr. 750, 177 Cal. App.3d. 62 (Cal. App. 3 Dist. 1986). An unlawful delegation of judicial power occurs when a person other than the judicial officer entrusted with the judgment makes the judicial decision. See **United States v. Raddatz** 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed.2d 424 (1980), **Sunshine Anthracite Coal Co. v. Adkins** 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. (1940). In **Burlington Northern v. Department of Revenue** 934 F.2d. 1064 (Ninth Cir. 1991), at 1073, when a judge '"delegated the judicial decision making function as to the entire case...." to a non article III judge, this was held to be the unlawful delegation of judicial power to a non-judge.

As in **United States v. Raddatz**, 447 U.S. 667, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980), judges may not abdicate their

judicial duties and powers to non-judicial persons without violating basic due process of law. The non-judicial and non-governmental status of the State Bar of California and its agents was described by the United States Supreme Court in **Keller v. State Bar of California,** 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d. 1 (1990), overruling 255 Cal. Rptr. 542 (1989), at 13, as follows:

> "The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers."

Petitioner posits that that portion of California Rules of Court, Rule 951 (b) which purports to authorize the State Bar of California to suspend attorneys for not taking and passing the professional responsibility examination is unconstitutional as it unlawfully delegates this Honorable Court's judicial power to a private person with no supervision, no oversight, no monitoring, no controls, and no standards set forth in derogation of the fifth and fourteenth amendments's due process and equal protection

clauses to the United States Constitution.

The ex parte suspension mailed on February 25, 1998 by regular mail to the attorney to be effective on March 17, 1998 with no notice, no hearing, and no grounds which issued by Mr. O'Brien of the State Bar was unconstitutional and void for six reasons. The rule of court relied on is void as it violates the constitutional prohibition on a rule of court being inconsistent with the state statutes which prohibit the State Bar suspending attorneys. The rule of court relied on is unconstitutional as the unlawful delegation of judicial power to a private person. The taking was by a person who did not grant the license and was prohibited from taking it.

The taking of the license was without notice. The taking of the license was without a hearing. The taking of the license was irrational, arbitrary, capricious, and lacking in any substantive due process of law.

Fundamental due process of law requires notice before a vested license to practice law may be taken from an attorney. It

also requires that an attorney be provided a meaningful opportunity to be heard in own his defense at a meaningful time and place and before someone who has some competence. There has to be reason. There has to be reasoning. There has to be grounds. There has to be a hearing. There has to be a judge and a process. As the efforts of the attorney to stay the unconstitutional ex parte taking of his license make clear and the confusion about the effect of his stay request, this attorney could not have been punished for contempt of court for not complying with the order because he did not have the physical nor mental ability to take and pass the examination at the time proscribed in the order of one year. While the attorney could not constitutionally have been punished for not complying with the order, his license was taken without his being guilty of anything for over seven months. Exhibits E-J. This appears to be irrational, punitive, arbitrary, and lacking in substantive due process of law.

By reason of the patent unconstitutionality of the ex parte

suspension of Mr. O'Brien, the recommendation is erroneous and unlawful in claiming that the attorney was guilty of the unauthorized practice of law when he was forced with no notice to protect his clients from the damage and harm the State Bar was seeking to inflict on innocent members of the public by taking their lawyer from them without notice, grounds, or a hearing. Exhibit A:5: para three-four, 6-7: para. one and two.

The petitioner requests that this Petition be entertained to determine whether such ex parte suspensions by an employee of the State Bar of California are constitutional so that there is a record of this Honorable Court's determination for the United States Supreme Court.

Conclusion

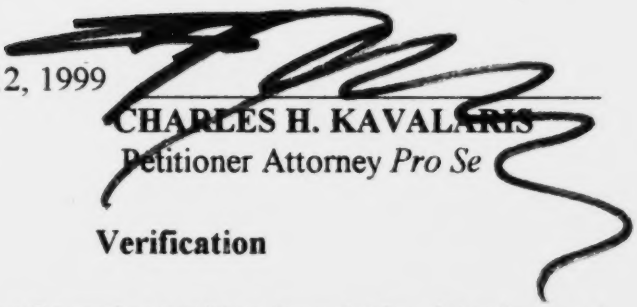
Due regard to the purposes of imposing discipline as set forth in standard 1.3 (i.e., the protection of the public, the maintenance of high professional standards, and the preservation of public confidence in the legal system.), would appear to support entertaining the instant Petition. The obligation of the

hearing judge was to include the mitigating factors presented and to provide them with weight in the determination of the appropriate disposition. However eight mandated mitigating factors which would reduce the recommendation to no more than ninety days were ignored. As such, the recommendation is unlawful and erroneous.

The petition should be entertained so that the constitutionality of the ex parte seven months' suspension by an employee of the State Bar because the attorney did not pass the professional responsibility examination in one year may be heard and decided. If the seven months' actual ex parte suspension is unconstitutional, this proceeding should be dismissed. The attorney has already served more time on an unlawful suspension than the disposition in this matter would warrant.

Equity and Justice would appear to recommend that this Honorable Court entertain this significant Petition and its important constitutional issues.

RESPECTFULLY SUBMITTED,



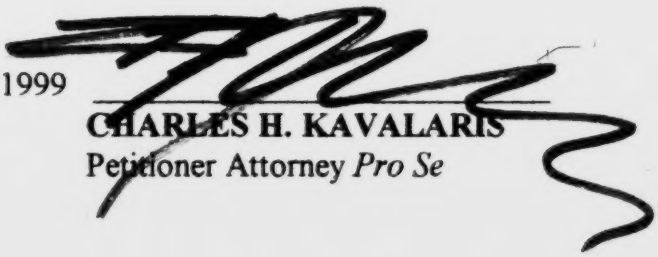
Dated: October 12, 1999

CHARLES H. KAVALARIS
Petitioner Attorney *Pro Se*

Verification

I have read the foregoing Petition for a Writ of Review and state it is made on my own personal knowledge, information, and belief, and this verification is executed this —— day of October, 1999 at San Jose, California.

RESPECTFULLY SUBMITTED,



Dated: October 12, 1999

CHARLES H. KAVALARIS
Petitioner Attorney *Pro Se*

SO56769

REVIEW DEPARTMENT OF THE

STATE BAR COURT

IN BANK

IN THE MATTER OF CHARLES

HAROLD KAVALARIS

A MEMBER OF THE STATE BAR OF

CALIFORNIA

Under the authority of subdivision of (b) of rule 951, California Rules of Court, Charles Harold Kavalaris is suspended from the practice of law in this state effective March 17, 1998, pending proof of passage , since he has not passed the California Professional Responsibility Examination or the Multistate Professional Responsibility Examination within the time prescribed in the Supreme Court order of January 7, 1997. (See Segretti v. State Bar (1976) 15 Cal. 3d. 878, 891, fn. 8; In the

Matter of Layton (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn.9)

James W. Obrien
Presiding Judge

THE STATE BAR ACT

California Business and Professions Code

Sec. 6079.1 STATE BAR COURT HEARING JUDGES

(a) The Supreme Court shall appoint a presiding judge of the State Bar Court and no fewer than seven hearing judges, and any additional hearing judges as may be authorized by the Legislature, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court.

. .

(c) The board shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge, and submit its nominations to the Supreme Court, unless otherwise directed by the Supreme Court. . .

(d) For judges appointed pursuant to this section or Section 6086.65, the board shall fix and pay reasonable compensation and expenses and provide adequate supporting staff and facilities.

Sec. 6079.5 CHIEF TRIAL COUNSEL; APPOINTMENT; TERM; QUALIFICATIONS

(a) The board shall appoint a lawyer admitted to practice in California to serve as chief trial counsel. . .

Sec. 6086.5 STATE BAR COURT; ESTABLISHMENT; POWERS; RULES

The board of governors shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of section 6007 to the extent provided by rules adopted by the board of governors pursuant to this chapter. . .

Sec. 6086.10 PAYMENT OF COSTS OF DISCIPLINARY PROCEEDINGS

(a) Any order imposing a public reproval on a member of the State Bar shall include a direction that the member shall pay costs. In any order imposing discipline, or accepting a resignation with a disciplinary matter pending, the Supreme Court shall include a direction that the member shall pay costs.

(b) The costs required to be imposed pursuant to this

section include all of the following:

(1) The actual expense incurred by the State bar for the original and copies of any reporter's transcript of the State Bar proceedings, and any fee paid for the services of the reporter.

(2) All expenses paid by the State Bar which would qualify as taxable costs recoverable in civil proceedings.

(3) The charges determined by the State Bar to be "reasonable costs" of investigation, hearing, and review. These amounts shall serve to defray the costs, other than fees for the services of attorneys or experts, of the State bar in the preparation or hearing of disciplinary proceedings, and costs incurred in the administrative processing of the disciplinary proceedings and in the administration of the client security fund..

(d) In the event an attorney is exonerated of all charges following a formal hearing, he or she is entitled to reimbursement from the State bar in the amount determined by the State bar to be the reasonable expenses, other than fees for attorneys or

experts, of preparation for the hearing. (Added by Stats. 1986, ch. 662.)

CALIFORNIA RULES OF COURT

Rule 951 (b) Professional Responsibility Examination

The State Bar Court shall have the power to extend the time within which a member of the State Bar must take and pass a professional responsibility examination, to suspend a member for failing to take and pass such examination, and to vacate a member's suspension for failing to take and pass such examination.